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**JUL 29 1992**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

July 28, 1992

FEDERAL EXPRESS/BY HAND

Donna Searcy, Secretary  
Federal Communications Commission  
1919 M Street NW Room 222  
Washington, D.C. 20554

Re: Healdsburg, CA MM Docket No. 92-111

Dear Ms. Searcy:

Enclosed for filing in the above-captioned proceeding are an original and six copies of Healdsburg Broadcasting, Inc.'s (a) Petition For Leave to File Consolidated Reply and (b) Consolidated Reply.

Should you have any questions concerning Healdsburg Broadcasting, Inc., please contact the undersigned.

Very truly yours,

  
Peter A. Casciato

enclosures

cc: Michael & Julia Akana  
w/encls.

PAC:sc

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046

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC

In re Applications of  
Deas Communications, Inc.,  
et al.

For A Construction Permit  
For A New FM Station on  
Channel 240A  
Healdsburg, California

) MM Docket No. 92-111

) File Nos. BPH-910208MB  
) et al.

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JUL 29 1992

To: Hon. Edward J. Kuhlmann,  
Administrative Law Judge

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CONSOLIDATED REPLY TO MASS MEDIA BUREAU'S CONSOLIDATED  
OPPOSITION TO RESPONSE TO ORDER TO SHOW CAUSE AND PETITION  
FOR LEAVE TO FILE CORRECTED AMENDMENT AND DEAS COMMUNICATIONS,  
INC.'S OPPOSITION TO PETITION FOR LEAVE TO FILE  
CORRECTED AMENDMENT

Healdsburg Broadcasting, Inc. ("HBI"), by its attorney,  
hereby replies to Mass Media Bureau's ("Bureau") Consolidated  
Opposition to HBI's Response to Order to Show Cause ("Show  
Cause Response") and HBI's Petition for Leave to File Corrected  
Amendment ("Petition") and Deas Communication, Inc.'s ("Deas")  
Opposition to HBI's Petition.

A. The Bureau Opposition

The Bureau opposes HBI's Petition and Show Cause Response,  
arguing that (1) the presiding judge is precluded from  
considering and acting favorably on the merits thereof under  
Atlantic Broadcasting Company, 5 FCC 2d 717, 8 RR 2d 991  
(1966), and (2) that HBI's claims that the de minimis error  
noted by the Bureau for the first time in its June 30, 1992  
Opposition to HBI's June 19, 1992 Petition are neither accurate  
nor esoteric.

The Bureau is wrong on the facts and wrong on the law.

Contrary to the claims of the Bureau, Atlantic Broadcasting, supra, provides the presiding judge specific authority to rule on the merits of HBI's Show Cause Response and its Petition to File Corrected Amendment.<sup>1</sup> Atlantic specifically states that a delegated authority -- in this case, the presiding judge -- is allowed independent authority to consider a question dealt with by the Commission in a designation order, if new facts or circumstances arise justifying a different conclusion. As indicated in Radio Gaithersburg, Inc., 41 RR 2d 711, 713 fn. 1, (ALJ Conlin 1977), the Bureau Chief's consideration of an issue by delegated authority is not the same as the Commission's consideration of an issue and, ipso facto, the presiding judge in this proceeding has unbridled discretion to determine the merits of any such interlocutory request de novo.

Even if were true -- which it is not -- that the Hearing Designation Order ("HDO") in this proceeding dealt with the de minimis radiation pattern error first noted in the Bureau's June 30, 1992 Opposition, the error by Jampro Antennas, Inc. ("Jampro") constitutes new facts and circumstances which in no way were raised, let alone considered and disposed of, by the HDO. As the HDO makes abundantly clear at para. 20, the perceived problem by the Bureau with HBI's engineering was

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<sup>1</sup> Indeed, the presiding judge's Memorandum Opinion and Order FCC 92M-782, released July 16, 1992, implicitly recognizes this fact by its very issuance, since if the Bureau's Opposition is true, no matter what HBI states, the presiding judge must disregard it, an obvious denial of both procedural and substantive due process to HBI.

"antenna height and contour overlap deficiencies," not HBI's radiation pattern. As even the Bureau's June 30, 1992 Opposition to HBI's June 19, 1992 Petition for Leave to Amend concedes, HBI cured those defects.

Likewise, the Bureau's attempt to minimize the extent of the esoteric nature of HBI's minor error falls under its own weight. First, if the error was so glaringly apparent, why did not the Bureau fail to find it in HBI's initial application or its September 25, 1991 Amendment? No mention is made in the HDO of this fact or the Bureau's pleadings.<sup>2</sup> Second, the error itself is clearly both trivial and esoteric since (a) it concerns, as the Benjamin Dawson (Attachement 1 to HBI Show Cause Response) declaration indicates, a relative field difference of .02 at 190 degrees (0.64 instead of 0.62) and (b) went undetected by Jampro and four sets of engineers (Stephen Peterson and Dawson for HBI, Elliott Klein for Deas and the Bureau's own processing engineers). By comparison, the facts of a case directly on point, Magdalene Gunden Partnership, 2 FCC Rcd 5513, 5515 paras. 7-8; 63 RR2d 1647 (Rev. Bd. 1987) recon. denied 3 FCC Rcd 488; rev. denied on other grounds, 3 FCC Rcd 7186 (1988) pet. for recon. denied, 5 FCC Rcd 2509 (1990) aff'd in part and reversed and remanded in part, 69 RR2d 613, 615-616, sub nom Marin TV Services Partners, Ltd. v. FCC (D.C.

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<sup>2</sup> And, of course, even if the Atlantic standards were applicable, this again demonstrates that this is a new fact and circumstance not dealt with by the HDO.

Cir. 1991), demonstrate that HBI's minor error is even more esoteric and elusive than those which allowed the Review Board, Commission and D.C. Circuit to conclude there, that a highly technical error, even in the absence of good engineering practices, should not be saddled on an applicant relying in good faith on its engineer. 63 RR 2d at paras. 6-9; 69 RR 2d at 615-616. HBI should be treated no differently.

B. The Deas Opposition

In summary, Deas claims that any trained engineer would have picked up Jampro's error, that HBI's corrected amendment does not solve its so-called "do or die" issue in the HDO, that HBI's Petition constitutes its fourth attempt to cure a defect, and that despite the fact that HBI's Petition and Show Cause Response are devoted to showing that the de minimis error in its June 19, 1992 Amendment was the result of a typographical error by Jampro that HBI could not have foreseen (see HBI's Petition at 1-3, 5-7; Show Cause Response at 1-4, 6-8), HBI has not met the good cause foreseeability test.

Deas' facially plausible assertions do not survive careful scrutiny and should be rejected. First, if it is true that any trained engineer would have picked up this highly technical error, why did (1) the Bureau miss it twice, in the HDO and in HBI's September 25, 1991 Amendment and (2) Deas' own engineer, Elliott Klein, miss it in Deas' June 29, 1992 Opposition to HBI's June 19, 1992 Petition for Leave to Amend? Logically, either all engineers are incompetent or Deas is wrong and the

error was highly technical and esoteric. Similarly, that the latent de minimis error existed in HBI's initial engineering up to and until its recently filed corrected amendment only underscores its highly technical, esoteric, de minimis nature, a .02 difference in the relative field values for 190 degrees.

As for foreseeability, as HBI's Petition and Show Cause Response make abundantly clear, how does an engineer find an error when the manufacturer of the antenna represents and warrants its compliance with the pertinent FCC rule (see Attachment 2 to Show Cause Response, the Jampro Pattern Envelope) providing data for 40 separate azimuths of which only one, the 190 degree azimuth, is incorrect and which the Bureau twice, Deas once and HBI twice fails to detect? This is the essence of unforeseeability, particularly for an applicant made up of lay people who reasonably rely on their engineers and who, in turn, reasonably relied on the manufacturer of the antenna. As the D.C. Circuit concluded in Marin TV Services Ltd. v. FCC, supra, an expert could not have necessarily foreseen this highly technical error and an applicant is entitled to rely on its expert in that regard.

It is noteworthy that neither Deas nor the Bureau can rebut the applicability of Magdalene Gunden Partnership, supra, to HBI's facts or legal setting. The Bureau ignores it entirely,; Deas merely relegates it to a footnote (7 at p. 5), attempting to wrongfully analogize HBI's de minimis error to the failure of an applicant in Pueblo Radio Broadcasting

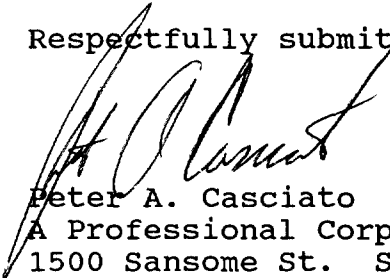
Service, 5 FCC Rcd 6278 (1990) to observe the technical requirements of the US/Mexican FM Agreement. This argument grossly overlooks that there is a quantum leap between compliance with an international treaty and making a .02 field value error based on a third party typographical error. Moreover, when the error was discerned by the Bureau, HBI moved promptly, within twelve days, to correct it, the essence of due diligence.

Contrary to the other Deas' assertions, HBI's corrected amendment has not disrupted the orderly continuity of the hearing. HBI has and will comply with all of the scheduling matters required by the presiding judge and the HDO. It has complied with discovery requests and will complete discovery by September 18, 1992 as mandated by the presiding judge's Memorandum Opinion and Order FCC 92M-809 released July 23, 1992. The de minimis engineering error was not the result of its own voluntary act but made in reliance on the discovery of the typographical error by Jampro and its engineer and was promptly corrected upon notice thereof. Thus, in all respects, HBI has met the good cause tests of Sections 73.3514 and 73.3522 of the Commission's rules.

Deas' attempt to characterize HBI's June 19, 1992 Amendment as "do or die" is a clever attempt to mislead the presiding judge away from the facts and circumstances that gave rise to the Jampro .02 relative field value error which is truly trivial, as Mr. Dawson pointed out in his declaration.

No party has a vested interest in the disqualification of a competing applicant, particularly when the Commission favors a choice among qualified applicants. Crosthwait v. FCC, 584 F. 2d 550, 44 RR 2d 107 (D.C. Cir. 1978). To that end, HBI respectfully requests that its Corrected Amendment be accepted nunc pro tunc and that the Oppositions of the Bureau and Deas be dismissed and denied.

Respectfully submitted,



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July 28, 1992

Counsel to Healdsburg  
Broadcasting, Inc.

CERTIFICATE OF SERVICE

I, Peter A. Casciato, certify that the following is true and correct:

I am employed in the City and County of San Francisco, California, am over the age of eighteen years, and am not a party to the within entitled action:

My business address is: 1500 Sansome St., Suite 201, San Francisco, California 94111.

On July 28, 1992, I caused the attached Consolidated Reply of Healdsburg Broadcasting, Inc. to be served by causing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, to be placed in the United States Post Office mail box at San Francisco, California, addressed to the following listed people:

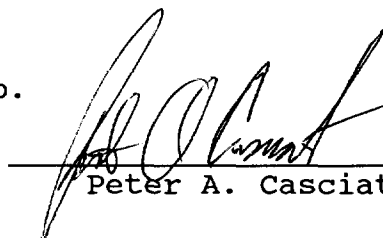
Hon. Edward J Kuhlmann  
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Federal Communications Commission  
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